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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 268

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1934
CERTIORARI GRANTED OCTOBER 8, 1934

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1 Before United States Board of Tax Appeals

Docket No. 49401

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances:

For petitioner: Bernhard Knollenberg, Esq., Harry J. Rudick, Esq.

For respondent: P. A. Bayer, Esq.

1930

June 30—Petition received and filed. Taxpayer notified. (Fee paid.)

July 1—Copy of petition served on general counsel.

Aug. 7—Answer filed by general counsel.

" 16—Copy served on taxpayer—General Calendar.

Nov. 3—Order placing on Circuit Calendar for New York City entered.

1932

Dec. 22—Notice of hearings at New York City beginning January 16, 1933.

1933

Jan. 17—Hearing had before E. H. Van Fossan, division 9. Submitted on merits. Briefs due in 60 days. Called from calendar call January 16, 1933.

" 28—Transcript of hearing of January 17, 1933, filed.

Mar. 18—Brief filed by general counsel.

2 Mar. 24—Motion for extension to March 24, 1933, for filing briefs filed by taxpayer. March 24, 1933, granted.

" 24—Brief filed by taxpayer.

May 5—Memorandum opinion rendered—Ernest H. Van Fossan, division 9. Decision will be entered for respondent.

" 10—Decision entered—E. H. Van Fossan, division 9.

" 25—Petition for review by U. S. Circuit Court of Appeals (Second) with assignments of error filed by taxpayer.

June 1—Proof of service filed by taxpayer.

" 22—Statement in lieu of statement of evidence filed.

" 22—Praecipe filed.

" 29—Proofs of service filed.

Before United States Board of Tax Appeals

[Title omitted]

Petition

Filed June 30, 1930

The above-named petitioner hereby petitions for a redeter-
3 mination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT–ET–C1–2439–CW) dated May 23, 1930, and as a basis of his proceeding alleges as follows:

(1) The petitioner is the executor of the estate of Annie Stone, deceased, and resides at 910 Park Avenue, New York, New York.

(2) The notice of deficiency (a copy of which is annexed hereto and marked "Exhibit A") was mailed to the petitioner on May 23, 1930.

(3) The taxes in controversy are estate taxes for the year 1927 and for $6,061.15.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner erred in including in the gross estate of the decedent $75,764.26, representing the value of certain property over which the decedent had a power of appointment.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The decedent Annie Stone died on September 24, 1927, a resident of the State of Connecticut.

(b) The pertinent provision of her will which was executed May 13, 1899, and which was duly probated January 4th, 1928, are as follows:

"Fifth. All the rest, residue and remainder of my estate, both real and personal, of every kind and description and wheresoever
4 situated, including whatever property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath in equal shares to my dear sisters Ellen J. Stone and Sarah J. Grinnell, the latter the wife of E. Morgan Grinnell, to have and to hold the same to them, their heirs, executors, administrators and assigns forever."

(c) John O. Stone, the father of the decedent and of Ellen J. Stone and Sarah J. Grinnell, died on June 7th, 1876, a resident of the State of New York.

(d) The pertinent provisions of his will which was executed June 3, 1870, and which was duly probated June 26th, 1876, were as follows:

"Fifth. All the residue of my estate, real, and personal, whatsoever and wheresoever including the reversion of the house No. 27 West 23rd Street, or the proceeds thereof upon the termination

of my wife's life estate, I give, devise and bequeath unto my executors, hereinafter named, and the survivor of them and their successors lawfully to be appointed, in trust and to, for, and upon the uses following, that is to say, to divide the same into as many shares as there shall be children of mine surviving me or who shall have died before me leaving issue surviving me, to keep the whole thereof well and safely invested so that it may produce a regular income with power from time to time as occasion may require to change the investment of the same or any part thereof, and
5 to apply the income of each share until the child for whom that share is designated shall attain the age of twenty-one years, to the suitable maintenance and education of such child and from and after the time when each of my children, who shall survive me shall attain the age of twenty-one years, to apply to her use for life the income of the share set apart to her as aforesaid upon her sole and separate receipt free from all control, claim, or obligation of any husband she may have, and upon the death of my children respectively their respective shares of my estate shall go and be applied to such persons, and such uses as they respectively may appoint by last will and testament, and in default of such appointment their respective shares of my estate shall go and belong to their children or issue respectively, by right of representation, or in default of such issue to their next of kin, and as respects the shares of my said residuary estate set apart for the issue of children of mine who shall have died before me to apply the income of each such share to their education and maintenance during minority and to pay over or transfer to each of such issue upon attaining or who shall have attained the age of twenty-one years, his or her share in full."

(e) John O. Stone left him surviving his widow, Catherine C. Stone (who died many years before the death of Annie Stone) and his three daughters, Annie Stone, Ellen Stone, and Sarah J. Grinnell, his only children, heirs at law and next of kin.

6 (f) Annie Stone, the decedent, died unmarried, without issue and leaving as her sole next of kin, her sisters, the said Ellen J. Stone and Sarah J. Grinnel.

(g) The value of the property left in trust for the life of Annie Stone under the fifth paragraph of her father's will (quoted above) and over which she had a power of appointment at the time of her death was $75,764.26.

(h) In February 1928 Ellen J. Stone and Sarah J. Grinnell executed an instrument of election whereby they renounced their right to receive said property under the fifth paragraph of decedent, Annie Stone's, will, and elected to take such property under the fifth paragraph of the will of their father, John O. Stone.

(i) At the time of Annie Stone's death and prior thereto the trust property in question was physically located in the State of New York.

(j) At the time of Annie Stone's death and prior thereto the trustee of the trust property was a resident of the State of New York.

(k) The Commissioner included in the gross estate of the decedent, Annie Stone, the value of the trust property at the time of her death.

(6) The petitioner prays for relief from the deficiency asserted by the respondent in the following particulars:

(a) That this Board may determine that the trust property referred to in subdivision (g) of paragraph (5) above is not a part of the gross estate of the decedent, Annie Stone, subject to the Federal estate tax.

7 (b) That this Board may determine that the deficiency asserted by the respondent is excessive by $6,061.15.

Wherefore, petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

BERNHARD KNOLLENBERG,
Counsel for Petitioner,
25 Broadway, New York, N. Y.

[*Duly sworn to by E. Morgan Grinnell, jurat omitted in printing.*]

8 *Exhibit A to petition*

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-C1.-2439-CW. District of 3rd New York. Estate of Annie Stone. Date of death—September 24, 1927.

TREASURY DEPARTMENT,
Washington, May 23, 1930.

E. MORGAN GRINNELL, *Executor,*
Estate of Annie Stone,
910 Park Avenue, New York, New York.

SIR: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of October 15, 1929. The deficiency in Federal estate tax hereby determined amounts to $9,628.78, and is fully explained in the attached statement consisting of two pages, showing the action of the Bureau with respect to the protest.

9 In accordance with the provisions of title III of the Revenue Act of 1926, you are allowed sixty days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals,

Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and to forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should
10 be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

(Signed) ROBT. H. LUCAS,
Robt. H. Lucas,
Commissioner.

Enclosures:
Statement,
Waiver—Form 890.

The protest is directed against the following items:

Gross estate

Powers of appointment	Returned	Tentatively determined	Determined
Value of property over which the decedent had a power of appointment created by the will of John O. Stone, deceased	$0.00	$75,764.26	$75,764.26

The decedent, under the provisions of the will of her father, John O. Stone, received a life interest in a portion of his residuary estate with the right to appoint that portion generally by her last will and testament. It was provided in said will of John O. Stone that in default of the execution of the power by Annie Stone that said portion was to go to her next of kin.

11 The decedent, Annie Stone, having died without issue provided under paragraph five of her will as follows:

"All the rest, residue, and remainder of my estate, both real and personal, of every kind and description and wheresoever situated, including whatever property or money I am allowed to dispose of by

will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath in equal shares to my dear sisters Ellen J. Stone and Sarah J. Grinnell, the latter the wife of E. Morgan Grinnell, to have and to hold the same to them, their heirs, executors, administrators, and assigns forever."

By an instrument in writing executed February 28, 1928, the sisters of Annie Stone renounced their right to receive the property under paragraph five of her will but elected to take this property under the provisions of the will of their father, John O. Stone. It is the contention of the estate that on account of this election the sisters received this trust property not by virtue of an exercise of a power of appointment vested in Annie Stone, but as remaindermen under the will of their father, John O. Stone, the creator of the power, and therefore the value of this property should not be included in the estate of Annie Stone for Federal estate tax.

The question of the taxability of such a power was before the United States Board of Tax Appeals in the case of Edward J. Hancey, executor of the will of Marie C. Howe v. The Commissioner of Internal Revenue. In an opinion promulgated by the
12 United States Board of Tax Appeals on September 25, 1929, and reported in 17 B. T. A. 464, it is held that notwithstanding the election by the beneficiaries to accept the property as remaindermen under the will of the original donor of the power, nevertheless the value of the property is taxable for Federal estate tax as part of the gross estate of the donee since the donee of the power had exercised her right to appoint by the provisions of her will.

In view of the foregoing no adjustment is being made under this schedule.

Deductions	Returned	Tentatively determined	Determined
Attorneys' fees	$20,000.00	$25,000.00	$25,403.13
Miscellaneous administration expenses	1,629.88	1,629.88	3,129.88
Debts of decedent	3,517.14	3,517.14	23,005.03

It is apparent from the evidence submitted by the estate that deduction should be allowed in the amounts indicated in the determined column. The total of the tentative deductions is therefore being increased in the sum of $25,292.02.

The following computation shows the Federal estate tax liability of this estate, which is hereby made final:

Gross estate	$1,154,638.81	$1,300,457.69	$1,300,457.69
Deductions	160,355.58	159,808.10	185,100.12
Net estate	994,283.23	1,140,649.59	1,115,357.57
Tax liability	48,099.83	59,751.97	57,728.61
Deficiency		11,652.14	9,628.78

The deficiency bears interest at the rate of six per centum per annum from one year after decedent's death to the date of
13 assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The record indicates that the estate is claiming credit on the basis of the return in the sum of $38,479.86. The evidence on file shows that the estate is entitled to credit in the sum of $38,364.33. The claim for credit is therefor being disallowed in the sum of $115.53. In addition to the deficiency and interest, there should be paid to the collector of internal revenue any undischarged returned tax and interest due to the disallowance of credit.

Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Aug. 7, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, in
14 answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in the paragraph of the petition numbered (1).

(2) Admits the allegations contained in the paragraph of the petition numbered (2).

(3) Admits so much of the paragraph of the petition numbered (3) as alleges that the taxes in controversy are estate taxes, but denies that the amount in controversy is $6,061.15, as alleged in the paragraph of the petition numbered (3).

(4) Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered (4).

(5) (a) Admits so much of subparagraph (a) of the paragraph of the petition numbered (5) as alleges that the decedent, Annie Stone, died on September 24, 1927, but denies every other allegation contained in subparagraph (a).

(b), (c), (d), (e), (f), and (g). Admits the allegations contained in subparagraphs (b), (c), (d), (e), (f), and (g) of the paragraph of the petition numbered (5).

(h) Denies the allegations contained in subparagraph (h) of the paragraph of the petition numbered (5).

(i), (j), and (k). Admits the allegations contained in subparagraphs (i), (j), and (k) of the paragraph of the petition numbered (5).

(6) Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

15 Wherefore, it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.
EGS/Imh–8/1/30.

Before United States Board of Tax Appeals

Docket No. 49401

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNE STONE, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Harry J. Rudick, Esq., for the petitioner.
P. A. Bayer, Esq., for the respondent.

Memorandum opinion

VAN FOSSAN: In this case we are asked to set aside a deficiency of $6,061.15 in estate taxes. The matter was submitted for
16 decision on the pleadings supplemented by certain documents.

The only issue involved is whether certain property over which the decedent had and exercised a general power of appointment was properly included in the taxable estate.

The decedent, Annie Stone, a resident of the United States, died on September 24, 1927. She had a general power of appointment, exercizable by will over certain property which originally formed part of the estate of her father, John O. Stone. The said John O. Stone died a resident of the State of New York in 1876 and by his will, duly probated in 1876, he created for the benefit of the present decedent, Annie Stone, a trust fund from which she was to receive the income during her lifetime, and over the principal of which she was to have a general power of appointment. The pertinent provisions of John O. Stone's will were as follows:

"Fifth. All the residue of my estate, real and personal, whatsoever and wheresoever, including the reversion of the house no. 27 West 23rd Street, or the proceeds thereof upon the termination of my wife's life estate, I give, devise, and bequeath unto my executors,

hereinafter named, and the survivor of them and their successors lawfully to be appointed, in trust and to, for, and upon the uses following, that is to say, to divide the same into as many shares as there shall be children of mine surviving me or who shall have died before me leaving issue surviving me, to keep the whole thereof well and safely invested so that it may produce a regular income,
17 with power from time to time as occasion may require to change the investment of the same or any part thereof, and to apply the income of each share until the child for whom that share is designated shall attain the age of twenty-one years, to the suitable maintenance and education of such child, and from and after the time when each of my children who shall survive me shall attain the age of twenty-one years, to apply to her use for life the income of the share set apart to her as aforesaid upon her sole and separate receipt free from all control, claim, or obligation of any husband she may have, and upon the death of my children respectively their respective share of my estate shall go and be applied to such persons and such uses as they respectively may appoint by last will and testament, and in default of such ap'ointment their respective shares of my estate shall go and belong to their children or issue respectively, by right of representation, or in default of such issue to their next of kin, and as respects the shares of my said residuary estate set apart for the issue of children of mine who shall have died before me to apply the income of each such share to their education and maintenance during minority and to pay over or transfer to each of such issue upon attaining or who shall have attained the age of twenty-one years, his or her share in full."

John O. Stone was survived by his widow (who died many
18 years before the death of the present decedent), and by his three daughters, Annie Stone (the present decedent), Ellen J. Stone, and Sarah J. Grinnell, his only children, heirs at law and next of kin. Pursuant to the provisions quoted above, one-third of John O. Stone's residuary estate was held in trust for the benefit of the present decedent, Annie Stone, during her lifetime, subject to the provision that the principal of such trust fund on her death should be paid over "to such persons, and for such uses" as she might "appoint by last will and testament, and in default of such appointment", to her issue, or in default of such issue, to her next of kin.

Annie Stone, the present decedent, died unmarried and without issue, and left as her sole next of kin, her sister, the said Ellen J. Stone, and Sarah J. Grinnell. By her will the said Annie Stone left the residue of her estate "including whatever property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York", in equal shares to her two sisters, the said Ellen J. Stone and Sarah J. Grinnell. The pertinent provisions of said will of Annie Stone were as follows:

"Fifth. All the rest, residue, and remainder of my estate, both real and personal, of every kind and description and wheresoever situated, including whatever property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath
in equal shares to my dear sisters Ellen J. Stone and Sarah
19 J. Grinnell, the latter the wife of E. Morgan Grinnell, to
have and to hold the same to them, their heirs, executors, administrators, and assigns forever."

At the time of Annie Stone's death, the value of the property left in trust for her life under the fifth paragraph of her father's will and over which she had a general power of appointment was $75,764.26.

In February 1928 Ellen J. Stone and Sarah J. Grinnell executed an instrument of election, whereby they renounced their right to receive said property under the fifth paragraph of the decedent Annie Stone's will and elected to take such property under the fifth paragraph of the will of their father, John O. Stone. The pertinent language of said certificate of election was as follows:

"Now, therefore, we, the undersigned, Ellen J. Stone and Sarah J. Grinnell, being the surviving sisters of said Annie Stone, deceased, and her only next of kin, do hereby severally elect to take directly from said John O. Stone under the provisions of his will, the title to the property heretofore held in trust for the said Annie Stone, deceased, instead of under the exercise of the power of appointment given to the said Annie Stone by the will of her father, said John O. Stone, exercised by said Annie Stone by the fifth article of her said will."

The said certificate of election was filed in the Surrogates
20 Court of the County of New York (State of New York) in
connection with the accounting of the trustees of John O. Stone; and pursuant to same it was ordered and decreed by the said Surrogates Court as follows:

"And it further appearing from the instrument of election filed herewith that Ellen J. Stone and Sarah J. Grinnell, the beneficiaries of the will of Annie Stone, deceased, and appointees under exercise of the power of appointment therein made, have elected to take under the terms of the will of said decedent, John O. Stone, as remaindermen of the trust for said Annie Stone, deceased, instead of as appointees under her will, it is hereby further

"Ordered, adjudged, and decreed that the payments heretofore made to them as remaindermen of said trust as set forth in the account, be and the same hereby are ratified and confirmed, and that the balance of principal of said trust if any remaining after making payments hereinabove provided for be paid over in equal shares to said Ellen J. Stone and Sarah J. Grinnell."

At the time of Annie Stone's death and prior thereto the trust property in question was physically located in the State of New York and the trustee of the trust property was a resident of the State of New York.

Petitioner on brief admits that this case comes within the rule laid down in Edward J. Hancy, Exec., 17 B. T. A. 464. He contends, however, that in the Hancy case the Board erred in its
21 conclusion. The Hancy case has been cited by the Board as authority in numerous later decisions and it stands as the considered judgment of the board. See Mary M. Lee, Executrix, 18 B. T. A. 251, affd. C. A. D. C. 57 Fed. (2d) 399, certiorari denied 286 U. S. 563; Bank of New York and Trust Co., Executor, 21 B. T. A. 197; Cortland F. Bishop, Executor, 23 B. T. A. 920; Joseph Walker Wear et al., Executors, 26 B. T. A. 684. Certain observations made in the last cited case are equally pertinent here:

"Petitioners concede that the power was a "general power." It is established by the facts that it was exercised. The exercise of the power brought the case within the wording and intent of the Federal tax statute and justified the respondent's action. * * *

"Nor are we disturbed or hindered in reaching the above conclusion because in a case arising under the same documents it was decided by the Orphans' Court of Philadelphia County that the attempted exercise of the power of appointment was a nullity and the award should have been made to the distributees under the will of Thomas Potter. Whatever may have been the effect of this decision in the local administration of the estate, and it would seem that under the facts it was of no effect, the only announced reason for amending the earlier decision being to bring the parties within the rule announced in Estate of Helen M. W. Grant, 13 B. T. A.
22 174, this decision is not conclusive of the question before us. The Board of Tax Appeals is a Federal tribunal engaged in deciding questions presented under the Federal taxing acts. Though there are certain restricted situations in which the local may be controlling, in the present case we are not so confined. The statute which we are here interpreting was enacted by the Congress of the United States to meet certain situations and achieve certain results. As has been said by the Supreme Court, 'the act of Congress has its own criteria', and in determining whether or not there has been a transfer under the Federal statute we must look to the interpretations adopted by the Federal courts and tribunals." See Edward J. Hancy, supra; Chase National Bank v. United States, 278 U. S. 327; Pennsylvania Co., etc., v. Lederer, supra; Fidelity Philadelphia Trust Co. v. McCaughn, 34 Fed. (2d) 600.

Decision will be entered for the respondent.

Enter:

Entered May 5, 1933.

23 Before United States Board of Tax Appeals

Washington

Docket No. 49401

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered May 5, 1933, it is

Ordered and decided: That there is a deficiency of $9,628.78 in estate taxes.

Enter:

Entered May 10, 1933

[SEAL] (Signed) ERNEST H. VAN FOSSAN,
Member.

24 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

Filed May 25, 1933

E. Morgan Grinnell, as executor of the estate of Annie Stone, deceased, hereby petitions for the review of the decision of the United States Board of Tax Appeals rendered on the 10th day of May, 1933, which approves a deficiency of $9,628.78 in the estate tax payable by the decedent's estate.

I

STATEMENT OF NATURE OF CONTROVERSY

1. On May 23, 1930, the respondent mailed to the petitioner a notice of a deficiency of $9,628.78 in the Federal estate tax on the estate of Annie Stone, hereinafter referred to as the decedent. Of this alleged deficiency $6,061.15 was based on a ruling of the respondent that certain property over which the decedent had a power of
25 appointment was required to be included in her gross estate for the purpose of computing the tax.

2. Thereafter, within sixty days of May 23, 1930, the petitioner filed with the United States Board of Tax Appeals a petition requesting the redetermination of the said deficiency. Said petition, after alleging the jurisdictional facts, alleged that the Com-

missioner erred in including in the gross estate of the decedent $75,764.26, representing the value at the date of decedent's death of certain property over which the decedent had a power of appointment. The said property originally formed part of the estate of decedent's father, John O. Stone, who died in 1876, a resident of New York. By his will he created a trust of the property, giving the decedent the income therefrom for her life and a general power of appointment over the remainder, exercisable by will. In default of the exercise of the power, the property was to pass to decedent's next of kin. The decedent by her will purported to exercise the power in favor of the same persons who would take in the event of a default in the exercise of the power. The said persons renounced their right to receive the property as appointees under the will of the decedent and elected instead to take it as remaindermen under the will of decedent's father, the donor. The Commissioner of Internal Revenue included the property in the decedent's gross estate on the ground that it represented "property passing under a general power of appointment exercised by the decedent by will." (Sec. 302 [f] of the Revenue Act of 1926.) All of these facts were alleged in the petition.

26 3. Thereafter the respondent filed with the said Board of Tax Appeals his answer to the afore-mentioned petition. The said answer admitted the jurisdictional facts and substantially all of the other facts, but denied error.

4. The cause being at issue under the rules of practice of the said Board of Tax Appeals upon the filing of the answer duly came on for hearing on January 17, 1933, at New York, New York, before Hon. Ernest H. Van Fossan. At the hearing the matter was submitted for decision on the pleadings, supplemented by certain documents. Thereafter on May 5, 1933, the said Board rendered a memorandum opinion and decided that the decedent had exercised the power of appointment and that the property subject thereto was properly included in the taxable estate. The said memorandum opinion contained a statement of the facts based on the pleadings and documents, the relevant portions of the documents being given in said statement of facts. On May 10, 1933, the Board rendered its final order of redetermination, approving the deficiency as determined by the respondent.

II

DESIGNATION OF COURT OF REVIEW

The petitioner being aggrieved by the said opinion, decision, and order, and being an inhabitant of the city and State of New York, desires a review in accordance with the provisions of the Rev-

27 enue Act of 1926, by the United States Circuit Court of Appeals for the Second Circuit, within which circuit is located the office of the collector of internal revenue to whom said petitioner made the estate tax return and paid the estate tax.

III

ASSIGNMENTS OF ERROR

The petitioner, as a basis for review, makes the following assignments of error:

1. The Board of Tax Appeals erred in holding that the decedent exercised the power of appointment.

2. The Board of Tax Appeals erred in holding that the property subject to the power should be included in the decedent's taxable estate.

3. The Board of Tax Appeals erred in not determining that the alleged deficiency should be reduced by $6,061.15.

Wherefore, your petitioner prays that the United States Circuit Court of Appeals for the Second Circuit may review the said decision, opinion, and order and reverse and set aside the same and that the clerk of the United States Board of Tax Appeals be directed to transmit and deliver to the clerk of the said court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing petition for
28 review, as required by the rulings of said court and statutes made and provided.

(S.) BERNHARD KNOLLENBERG,
Attorney for Petitioner,
25 Broadway, New York, N. Y.

[*Duly sworn to by Bernhard Knollenberg, jurat omitted in printing.*]

29 Before United States Board of Tax Appeals

[Title omitted.]

Statement in lieu of statement of evidence

Filed June 22, 1933

This proceeding was submitted for decision on the pleadings, supplemented by certain documents. All of the facts necessary to the determination of the present appeal are contained in the memorandum opinion of the Board.

Dated, June 15th, 1933.

BERNHARD KNOLLENBERG,
Counsel for Petitioner.
E. BARRETT PRETTYMAN,
Counsel for Respondent.

30 Before United States Board of Tax Appeals

[Title omitted.]

Praecipe for record

Filed June 22, 1933

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above entitled case, transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Pleadings before the Board.
3. Memorandum opinion and decision of the Board.
4. Petition for review.

31 5. Statement in lieu of statement of the evidence.

The foregoing to be prepared, certified, and transmitted, as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

BERNHARD KNOLLENBERG,
Bernhard Knollenberg,
Attorney for Petitioner.

JUNE 21, 1933.

32 [Clerk's certificate to foregoing transcript omitted in printing.]

33 In United States Circuit Court of Appeals for the Second Circuit

No. ——

E. MORGAN GRINNELL, EXECUTOR OF THE ESTATE OF ANNIE STONE, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Motion for substitution

Comes now the above-named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substituted for David Burnet as respondent herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeding and obtaining an adjudication of the questions involved, for otherwise the order of the United States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of section 11 of the act of February 13, 1925, c. 229, 43 Stat. 941 (U. S. C., title 28, sec. 780).

Dated June 7, 1933.

BERNHARD KNOLLENBERG,
Attorney for Petitioner.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

SEWALL KEY,
Sewall Key,
Special Assistant to the Attorney General,
Attorney for Guy T. Helvering,
Commissioner of Internal Revenue.

In United States Circuit Court of Appeals

Order of substitution

Upon motion of the petitioner, expressly consented to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

WM. PARKIN, *Clerk.*

Dated July 15, 1933.

34 In United States Circuit Court of Appeals for the Second Circuit

No. 120. October term, 1933

Argued April 10, 1934. Decided April 30, 1934

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE, Deceased, petitioner-appellant

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLEE.

Appeal from the Board of Tax Appeals.

Before MANTON, SWAN, AND AUGUSTUS N. HAND, Circuit Judges.

The Commissioner of Internal Revenue determined a deficiency in estate tax against the estate of Annie Stone, who died on September 24, 1927, a resident of Connecticut. From an order of the Board of Tax Appeals affirming such determination, the taxpayer E. Morgan Grinnell, as executor of the will of Annie Stone, appeals. Reversed.

Bernhard Knollenberg, of New York City (Allen E. Foster and Harry J. Rudick, both of New York City, of counsel), for petitioner-appellant.

Frank J. Wideman, Asst. Atty. Gen., and Sewall Key and John MacC. Hudson, Sp. Assts. to Atty. Gen., for respondent-appellee.

Opinion

AUGUSTUS N. HAND, *Circuit Judge:*

The question involved upon this appeal is whether a trust fund created by the will of John O. Stone, who died in 1876, a resident of New York, over which his daughter Annie Stone, who died September 24, 1927, had a power of appointment by will, should be included in her gross estate for the purpose of determining the federal estate tax.

The devolution of the property in question is governed by article fifth of the will of John O. Stone. Under that article the testator bequeathed his residuary estate to his executors in trust to divide the same into as many shares as he should leave children him surviving and to apply the income of each share to the life use of the child for whom it was set apart. In disposing of the remainder interests, he provided that:

"Upon the death of my children respectively their respective share of my estate shall go and be applied to such persons, and such uses as they respectively may appoint by last will and testament, and in default of such appointment their respective shares of my estate shall go and belong to their children or issue respectively, * * * and in default of such issue to their next of kin. * * *"

John O. Stone left him surviving his wife, Catherine C. Stone, who died many years before the death of Annie Stone, and his three daughters Annie Stone, Ellen J. Stone, and Sarah J. Grinnell, who were his only children, heirs at law, and next of kin. Annie Stone, the decedent, died unmarried, without issue, and left as her sole next of kin, her sisters, Ellen J. Stone and Sarah J. Grinnell. The value of the property left in trust for the life of Annie Stone under article fifth of her father's will, and over which she had the power of appointment at the time of her death, was $75,764.26. She died on September 24, 1927, a resident of the State of Connecticut, leaving a will which was admitted to probate January 4, 1928, in which she provided as follows:

"Fifth. All the rest, residue and remainder of my estate both real and personal, of every kind and description and wheresoever situated including what property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath in equal shares to my dear sisters Ellen J. Stone and Sarah J. Grinnell, the latter the wife of E. Morgan Grinnell, to have and to hold the same to them, their heirs, executors, administrators, and assigns forever."

The property over which Annie Stone had a power of appointment was physically located in the State of New York, and at the time of her death, and prior thereto, the trustee thereof was a resident of that State.

In February 1928 Ellen J. Stone and Sarah J. Grinnell executed an instrument of election whereby they renounced their right to receive their shares of the trust fund, theretofore held for the life of Annie Stone, under the fifth article of the will of their father, John O. Stone.

The Commissioner included in the gross estate of the decedent, Annie Stone, the value of the trust property at the time of her death over which she had assumed to exercise the power of appointment given her by her father's will, and accordingly found a tax deficiency against her estate of $9,628.78. Her executor petitioned the Board of Tax Appeals for a redetermination of the deficiency in the estate tax upon the estate of Annie Stone by excluding the value of the trust property from her gross estate. The Board affirmed the action of the Commissioner and fixed the deficiency at $9,628.78.

The effect of the bequest under the will of John O. Stone, who died a resident of New York, and of the attempted exercise of the

power of appointment over the trust estate created thereby for the life use of his daughter Annie Stone, is determined by the law of New York. Restatement of the Law of Conflict of Laws, §§ 283, 307, and 328, American Law Institute.

Under the New York law, Ellen J. Stone and Sarah J. Grinnell, who were the next of kin of Annie Stone, had the right of election and might accept title either as appointees under the power which she attempted to exercise, or as remaindermen under the will of John O. Stone. As Judge Vann said in Matter of Lansing, 182 N. Y. 238, 245, 74 N. E. 882, 884, about a testamentary power exercised in favor of the same person who would take title if it had not been exercised:

"An appointee under a power has the right of election, the same as a grantee under a deed. 'It is essential to the legal operation of a deed that the grantee assents to receive it. It cannot be imposed upon him, and there can be no delivery without an acceptance.' Jackson v. Dunlap, 1 Johns. Cas. 114, 116, 1 Am. Dec. 100; Jackson v. Phipps, 12 Johns. 418. He can accept the title tendered or reject it, in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement."

In Matter of Lansing, supra, the facts closely resembled those here. There the appointee chose to take under the original will and not under the exercise of the power, and the Court of Appeals held that the trust estate which passed to her was not subject to the New York transfer tax because the death of the original testator from whom the property arose was prior to the enactment of a Transfer Tax Act and the property passed under his will and not by virtue of the exercise of the power. The court remarked at page 243 of 182 N. Y., 74 N. E. 882, 884:

"While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it, and she derived no benefit from it. The power was to 'dispose of the remainder,' and the remainder was not disposed of, but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form with no substance." Cf. Potter's Estate, 13 Pa. Dist. & Co. R. 667.

In the case at bar the next of kin of Annie Stone had executed an instrument of election in writing whereby they renounced their right to take under the power and elected to receive their share of the trust fund under the will of their father. They held a remainder interest in the capital of the trust estate which was alienable, devisable, and descendible under the New York law. It might have

been divested and diverted to other persons by an effective exercise of the power, but was not. Matter of Lansing, supra, is pre-
36 cisely in point unless section 302 of the Revenue Act of 1926 (26 U. S. C. A., § 1094) contains language which may differentiate it from the New York Transfer Tax Act (Consol. Laws, c. 60, § 220 et seq.). But we can discover nothing in the revenue act indicating that a fund appointed to the same persons who would take in remainder under the will of the donor, if the power were not exercised, is to be included in the estate of the person exercising the power or passes under the latter's will to appointees who are unwilling to accept the appointment.

Section 301 (a) of the Revenue Act of 1926 (26 U. S. C. A., § 1092) imposed an estate tax upon the transfer of the net estate of every decedent dying after its enactment, and section 302 (f) of the act (26 U. S. C. A., § 1094 (f) provided that, in valuing the gross estate, there should be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The trust estate here did not pass under the power of appointment for the reason that the appointees elected in writing to renounce their bequests under the will of Annie Stone and to take as remaindermen under their father's will, and for the further reason that, under the New York law, which governed the passage of title: "The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance." Matter of Lansing, 182 N. Y. 238, 243, 74 N. E. 882, 884.

In Wear v. Commissioner, 65 F. (2d) 665, the Court of Appeals of the Third Circuit held that property bequeathed under a general power of appointment to the same persons who would have taken in remainder, had the power not been exercised, for purposes of Federal estate taxes, "passed" under the power and accordingly must, by section 302 of the Revenue Act of 1926, be included in the gross estate of the person exercising the power, and this, though the law of Pennsylvania, like that of New York, treated the property as passing under the will of the donor. In Lee v. Commissioner, 61 App. D. C. 33, 57 F. (2d) 399, the Circuit Court of Appeals of the District of Columbia reached the same conclusion, as did the Third Circuit Court of Appeals in the later case of Wear v. Commissioner, 65 F. (2d) 665. In Wear v. Commissioner, Judge Woolley said, at page 667:

"Death, with an exercise of the power in their favor, was the event that wrought the change. Then their estate, theretofore contingent upon the nonexercise of the power against them, became vested, like the interest of a beneficiary of a policy of life insurance becomes vested upon the death of the insured without exercising a reserved right to change the beneficiary, the value of which must, under the cases, be included in the gross estate of the insured for

purposes of taxation. Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax. And such a tax, we hold, the Federal Government, under its sovereign power to levy taxes, may lawfully impose upon the exercise of a power effecting such a change, to be determined by actual results thereby brought about rather than by consideration of rules which define and limit title of property, Tyler v. United States, 281 U. S. 497, 503, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758, and to be measured (rather than determined) by the value of the property passing. * * *"

With all deference to the high authority of Judge Woolley and of the other judges of the Courts of Appeal of the Third Circuit and the District of Columbia, we feel constrained to differ with the conclusions they reached. It is conceded that the revenue act would not have imposed an estate tax upon the transfer if the remainder had vested in possession without an attempted exercise of the power of appointment. Therefore, it hardly seems right to say that: "The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax." Such reasoning would require the imposition of a tax under the act even though Annie Stone had died intestate, though the statute furnishes no warrant for taxation under such circumstances. The argument of the opinion in Wear v. Commissioner is concerned mainly with the constitutional authority of the Government to tax property where the source of the transfer was the death of the donee of a power "without action adverse" to persons having interests derived under the will of the donor. We need not differ with the conclusion that it might be taxed, but we think it was not taxed by an act directed only at property
37 "passing under a general power of appointment" because there was no such property here. The appointees not only declined to take the gift, but the appointment when exercised in favor of the same persons who would take irrespective of it was "a mere form with no substance" which the law of New York that regulates the passage of title has refused to recognize. Matter of Lansing, 182 N. Y. 238, 243, 74 N. E. 882. In a tax statute especially, such a doubtful imposition involving as it does an extension of the statute to cover powers of appointment, having no effective import, should not be sanctioned. Crooks v. Harrelson, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156.

It is argued that there was a shifting of economic benefits on the death of Annie Stone, which was the real subject of the tax, and that the taxation of insurance policies over which a decedent retains control during his life requires taxation here. Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. Likewise taxation of the interest of one of

the spouses when property held by them as tenants by the entirety passes to the survivor is thought to furnish an analogy to the present situation. Tyler v. United States, 281 U. S. 497, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758. But in each of those cases the statute expressly covered the subject matter sought to be taxed and the question was not one of interpretation, but of constitutional power. Here we find no warrant for holding that the interests which Ellen J. Stone and Sarah J. Grinnell took upon the death of Annie Stone passed under the power of appointment. Accordingly, they did not fall within the terms of section 302 of the Revenue Act of 1926 and should not have been included in her gross estate for purposes of the estate tax.

The order of the Board of Tax Appeals is reversed.

38 In United States Circuit Court of Appeals, Second Circuit

E. MORGAN GRINNELL, AS EXECUTOR, ETC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed May 7, 1934

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

39 [File endorsement omitted.]

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 Supreme Court of the United States

Order allowing certiorari

Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 38,896. U. S. Circuit Court of Appeals, Second Circuit. Term No. 268. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. E. Morgan Grinnell, as Executor of the Estate of Annie Stone. Petition for a writ of certiorari and exhibit thereto. Filed August 7, 1934. File No. 268 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE of Annie Stone

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above-entitled case May 7, 1934, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 33) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 15–22) is not reported.

JURISDICTION

The judgment of the court below was entered May 7, 1934 (R. 38). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May the value of property over which the decedent by will exercised a general power of appointment be included in her taxable estate, when she appointed the property to the same persons who would have taken under the will of the donor if the power had not been exercised and the appointees expressly elected to take under the will of the donor and not under the appointment?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and
>
> * * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

(U.S.C.App., Title 26, Sec. 1094.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 16–20) may be summarized as follows:

The decedent, Annie Stone, died September 24, 1927, a resident of the United States. John O. Stone, her father, died in 1876, a resident of New York, leaving a will whereby he devised the residue of his estate to executors in trust to divide into as many shares as there were children surviving him, or who may have died leaving issue surviving him, and to keep the same invested so as to produce a regular income. The income from the shares set apart for each child was to be applied to her maintenance and education until she reached twenty-one years of age and thereafter to her use for life. Upon the death of each child her share of the estate was given to such persons and such uses as she might appoint by will and in default of appointment her share was given to her children or issue and in default of issue to her next of kin.

John O. Stone was survived by his widow (who died many years before the present decedent) and three daughters, Sarah J. Grinnell, Ellen J. Stone, and Annie Stone (the present decedent), his only children, heirs at law and next of kin. Under the will of John O. Stone, one-third of his estate was held in trust for the benefit of the decedent during her life, and upon her death was distributable to such persons and for such uses as she might appoint by will, and in default of appointment, to her issue and in default of issue to her next of kin. The sole next of kin surviving Annie Stone, the decedent, who died without issue, were her sisters, Ellen J. Stone and Sarah J. Grinnell. By her will the decedent gave, devised, and bequeathed all the residue of her estate, including her share of her father's estate over which she had the power of appointment, to her sisters in equal shares. The value of the share of her father's estate left in trust for the decedent and over which she had a general power of appointment was $75,764.26 at the date of her death.

The decedent's sisters, by writing filed with the Surrogate's Court elected to take the share of their father's estate left in trust for the decedent under the will of their father and not under the appointment made by the decedent in her will.

The Commissioner determined that the share of the decedent's father's estate left in trust for her and appointed by her to her sisters should be in-

cluded in her gross estate and accordingly asserted a deficiency in estate taxes of $9,628.78. The Board of Tax Appeals sustained the determination of the Commissioner. The Circuit Court of Appeals for the Second Circuit reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the property appointed by the decedent by her will, under the general power conferred by the will of her father, did not pass under the exercise of the power within the meaning of the Revenue Act and, therefore, should not be included in her taxable estate.

2. In not holding that the property over which the decedent by will exercised the general power of appointment conferred by the will of her father, passed under the exercise of the power within the meaning of the Revenue Act and, therefore, must be included in her taxable estate, notwithstanding the property was appointed to the remaindermen under the donor's will and they expressly elected to take from the donor rather than under the exercise of the power.

3. In holding that the law of New York is controlling in determining whether property appointed under a general power exercised by will to the same persons who would have taken in default of the exercise of the power, passes under the exercise of the power within the meaning of the Federal Estate Tax Act.

4. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below in holding that the property did not pass under the exercise of the general power of appointment within the meaning of the Federal Estate Tax Act merely because it was appointed to the remaindermen under the donor's will, is in direct conflict with *Wear* v. *Commissioner,* 65 F. (2d) 665 (C.C.A. 3d), and *Lee* v. *Commissioner,* 57 F. (2d) 399 (App.D.C.), certiorari denied, 286 U.S. 563.

Respondent here conceded below that a tax on "property passing under a general power of appointment exercised by the decedent" is constitutional, and he further conceded that the power in the instant case is a general one and that it was exercised. His contention was that the property had not "passed under" the exercise of the power.

The court below expressly recognized the conflict suggested above, where it said (R. 36):

> In *Wear* v. *Commisisoner,* 65 F. (2d) 665, the Court of Appeals of the Third Circuit held that property bequeathed under a general power of appointment to the same persons who would have taken in remainder, had the power not been exercised, for purposes of Federal estate taxes, "passed" under the power and accordingly must, by

> section 302 of the Revenue Act of 1926, be included in the gross estate of the person exercising the power, and this, though the law of Pennsylvania, like that of New York, treated the property as passing under the will of the donor. In *Lee* v. *Commissioner,* 61 App.D.C. 33, 57 F. (2d) 399, the Circuit Court of Appeals of the District of Columbia reached the same conclusion, as did the Third Circuit Court of Appeals in the later case of *Wear* v. *Commissioner,* 65 F. (2d) 665. * * *
>
> With all deference to the high authority of Judge Woolley and of the other judges of the Courts of Appeal of the Third Circuit and the District of Columbia, we feel constrained to differ with the conclusions they reached. * * *

In the *Wear* case, *supra,* the court pointed out that the tax is imposed not upon the property but upon the transmission of or the privilege to transmit property, and stated the question of transmission to be not whether there has been strictly a transfer but whether the death has brought into being or ripened for the recipients valuable property rights not theretofore possessed.

In the *Lee* case, *supra,* where the nature of the tax as expounded in *Tyler* v. *United States,* 281 U.S. 497, 503, also is referred to, the court, in holding that property appointed in the exercise of a general power by will must be included in the donee's taxable estate although the appointee is the

remainderman under the donor's will, said that, since the donee of the power could have defeated the interest of the named devisee under the will of the donor, the exercise of the power in favor of such devisee at least confirmed title in him, and thus was the generating source of the title.

The decision below also seems in conflict with the principle controlling in *Stratton* v. *United States,* 50 F. (2d) 48 (C.C.A. 1st), certiorari denied, 284 U.S. 651. It does not definitely appear from the report of that case that the appointees of the property were remaindermen under the will of the donor, but this very point was urged in petitioning for certiorari in that case. (No. 303, October Term, 1931, Petition and Brief in Support, pp. 36–38; Brief in Opposition, pp. 6, 7.)

The decision below also is directly contrary to the decisions in *Pennsylvania Co. for Ins. on Lives, etc.* v. *Lederer,* 292 Fed. 629 (E.D.Pa.); *Bishop* v. *Commissioner,* 23 B.T.A. 920; and *Hancy* v. *Commissioner,* 17 B.T.A. 464.

2. The decision below is erroneous and nullifies the manifest purpose and intent of the statute. The court held that because title to the property passed, under the law of New York, to the appointees from the donor and not from the donee of the power the property did not *pass under* the exercise of the power of appointment and, therefore, was not within the statute. The conclusion of the court is based upon the state rule respecting the passage of title to property subject to a general power of ap-

pointment and a strict application of the literal language of the statute; and the court's conclusion in these respects conflicts with the principle established by this Court in *Burnet* v. *Harmel,* 287 U.S. 103, 109–110, and *Tyler* v. *United States,* 281 U.S. 497, 503.

The estate tax is imposed upon the power to transmit or the transmission of property at death, and the question in every case is not whether there has been a transfer in the strict sense, but whether the death has brought into being or ripened for the survivor (the recipients of property) valuable rights not theretofore possessed. The tax is not limited to transfers of property passing directly from the decedent, but includes as well property the completed transfer or passing of which depends upon or relates to the death of the decedent. *Tyler* v. *United States, supra,* and *Chase Nat. Bank* v. *United States,* 278 U.S. 327. The statutory provision here involved was incorporated in the Act in aid of the purpose to reach all transfers effected by the death of the decedent.

The Revenue Act of 1918 was the first statute expressly requiring property passing under a general power of appointment exercised by will to be included in the donee's estate, and the report of the Committee on Ways and Means referring thereto (H.Rep. No. 767, 65th Cong., 2d Sess., pp. 21–22) clearly shows that Congress deemed the donee of a general power of appointment over property to be the substantial owner thereof for the purposes of

the estate tax, and intended that such property should be included in the donee's estate when the power is exercised by will.

The court below in construing the statute disregarded this clear Congressional purpose and intent and in so doing violated a cardinal principle of statutory construction, as established by decisions of this Court. In *Helvering* v. *New York Trust Co.*, No. 873, October Term, 1933, decided May 28, 1934, this Court, quoting from *Ozawa* v. *United States*, 260 U.S. 178, 194, said:

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

3. The decision below is contrary to and negatives the consistent departmental interpretation of the statute and administrative practice. Article 30 of Regulations 37, promulgated under the 1918 Act, specifically provided that "property appointed under a general power should be included in the estate of the appointor, although the persons to whom the appointment was made would have taken the property had the power not been exercised.

* * *." Substantially identical regulations were promulgated under the Revenue Acts of 1921 and 1924 which contained provisions identical with that of the 1918 Act. (Article 25, Regulations 63; Article 24, Regulations 68.) No similar provision was contained in Regulations 70, promulgated under the Revenue Act of 1926, but the omission seems to have been inadvertent or possibly such a provision was considered unnecessary. The provision of the Revenue Act of 1926 is substantially identical with that of the preceding Acts. The reenactment of the pertinent statutory provision of the 1918 Act without change in the 1921, 1924, and 1926 Acts in view of the administrative interpretation of the statutes prior to 1926 would seem to indicate legislative approval of the Department's construction. *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U.S. 269, 273.

If permitted to stand the decision below must of necessity result in much confusion and uncertainty in the administration of an important provision of the revenue laws. A decision by this Court in the present case is essential to dispel this confusion and uncertainty.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

AUGUST 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 268

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 17) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 8–11) is not reported.

JURISDICTION

The judgment of the court below was entered May 7, 1934 (R. 22). The petition for certiorari was filed August 7, 1934, and was granted October

8, 1934. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May the value of property over which the decedent by will exercised a general power of appointment be included in her taxable estate, when she appointed the property to the same persons who would have taken under the will of the donor if the power had not been exercised and the appointees expressly elected to take under the will of the donor and not under the appointment?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and
>
> * * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

(U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 8–10) may be summarized as follows:

The decedent, Annie Stone, died September 24, 1927, a resident of the United States. John O. Stone, her father, died in 1876, a resident of New York, leaving a will whereby he devised the residue of his estate to executors in trust to divide into as many shares as there were children surviving him, or who may have died leaving issue surviving him, and to keep the same invested so as to produce a regular income. The income from the shares set apart for each child was to be applied to her maintenance and education until she reached twenty-one years of age and thereafter to her use for life. Upon the death of each child her share of the estate was given to such persons and such uses as she might appoint by will and in default of appointment her share was given to her children or issue and in default of issue to her next of kin.

John O. Stone was survived by his widow (who died many years before the present decedent) and three daughters, Sarah J. Grinnell, Ellen J. Stone, and Annie Stone (the present decedent), his only children, heirs at law and next of kin. Under the will of John O. Stone, one-third of his estate was held in trust for the benefit of the decedent during her life, and upon her death was distributable to such persons and for such uses as she might appoint by will, and in default of appointment, to her issue and in default of issue to her next of kin. The sole next of kin surviving Annie Stone, the decedent, who died without issue, were her sisters, Ellen J. Stone and Sarah J. Grinnell. By her will the decedent gave, devised, and bequeathed all the residue of her estate, including her share of her father's estate over which she had the power of appointment, to her sisters in equal shares. The value of the share of her father's estate left in trust for the decedent and over which she had a general power of appointment was $75,764.26 at the date of her death.

The decedent's sisters, by writing filed with the Surrogate's Court, elected to take the share of their father's estate left in trust for the decedent under the will of their father and not under the appointment made by the decedent in her will.

The Commissioner determined that the share of the decedent's father's estate left in trust for her and appointed by her to her sisters should be in-

cluded in her gross estate and accordingly asserted a deficiency in estate taxes of $9,628.78. The Board of Tax Appeals sustained the determination of the Commissioner. The Circuit Court of Appeals for the Second Circuit reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the property appointed by the decedent by her will, under the general power conferred by the will of her father, did not pass under the exercise of the power within the meaning of the Revenue Act and, therefore, should not be included in her taxable estate.

2. In not holding that the property over which the decedent by will exercised the general power of appointment conferred by the will of her father, passed under the exercise of the power within the meaning of the Revenue Act and, therefore, must be included in her taxable estate, notwithstanding the property was appointed to the remaindermen under the donor's will and they expressly elected to take from the donor rather than under the exercise of the power.

3. In holding that the law of New York is controlling in determining whether property appointed under a general power exercised by will to the same persons who would have taken in default of the exercise of the power, passes under the exer-

cise of the power within the meaning of the Federal Estate Tax Act.

4. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Section 301 of the statute imposes a tax upon the transfer of the net estate of every decedent dying after the enactment of the Act and Section 302 (f) provides that in valuing the gross estate there shall be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The property here in question was left by the father of the decedent in trust for her for life and, upon her death, to such persons and such uses as she might appoint by will and, in default of such appointment, to her next of kin. The decedent by her will exercised the power and appointed the property in equal shares to her sisters, who also were her next of kin. The power of appointment clearly was general and the decedent obviously exercised the power by will. The fact that the property would have passed to the appointees as remaindermen under their father's will if the power had not been exercised is immaterial, and it is not important that under the laws of the State of New York the appointees took title to the property from the father under his will and not from the decedent under the appointment. The tax is imposed not upon the property passing at death, but upon the

power to transmit or the transmission of property by death; the shifting of the economic benefits in property is the real subject of the tax. The real question is whether the death of the decedent ripened or enlarged for the survivors valuable property rights and not whether there has been strictly a transfer of property. Upon the death of this decedent, with the exercise of the power in favor of her sisters, their estate, theretofore contingent upon the nonexercise of the power adversely, became vested free from that risk. It was the death of the decedent with the exercise of the power in favor of her sisters that ripened or enlarged valuable property rights for them. It must be concluded that the property in question passed to the sisters under the general power of appointment exercised by the decedent by will within the meaning of the statute.

ARGUMENT

Section 301 of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Secs. 1092, 1093), imposes a tax upon the transfer of the net estate of every decedent dying after the enactment of the Act and Section 302 (f), *supra,* provides that in valuing the gross estate there shall be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The property here in question was left by the father of the decedent in trust for her for life and

upon her death to such persons and such uses as she might appoint by will and, in default of appointment and issue, to her next of kin. By her will the decedent, who died without issue, devised and bequeathed such property, together with the residue of her estate, in equal shares to her two sisters who were her sole next of kin.

The power of appointment conferred upon the decedent by the will of her father clearly was general (*Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164 (C. C. A. 3d)) nor has it been otherwise contended or suggested by the respondent or the court below. It seems equally plain that the decedent exercised the power by her will whereunder she devised and bequeathed all the residue of her estate, including the property which she was allowed to dispose of under the will of her father, to her two sisters in equal shares. Thus it would appear that the property left in trust for the decedent by her father and appointed by her will to her sisters falls squarely within the provisions of the statute, for it is property passing under a general power of appointment exercised by the decedent by will, and must be included in the decedent's taxable estate. The court below, however, held that this property did not pass under the power of appointment exercised by the decedent because under the law of New York the decedent's sisters took title to the property from their father and the property passed to them under their father's will and not by virtue of the

appointment. It is argued that the appointment having been made to the same persons entitled under the donor's will in default of appointment and such persons having expressly rejected the appointment and elected to take from the donor, the attempted exercise of the power was a nullity and the property passed under the will of the donor, citing *Matter of Lansing,* 182 N. Y. 238. Whether or not that decision is sound need not be considered, but it is interesting to observe that in *Matter of Cooksey,* 182 N. Y. 92, an appointment by will of property to the same persons who would have taken anyway under the will of the donor was a valid and effectual exercise of the power and the property passed under the power. The author of the opinion in the *Lansing* case concurred in the decision of the *Cooksey* case and the author of the *Cooksey* opinion dissented in the *Lansing* case. The distinction made in the *Lansing* case seems unsubstantial. Moreover, it would seem that the ultimate basis of the *Lansing* decision, that the property did not pass under the power because in contemplation of law the appointees took from the donor and not the donee, is untenable. See *Chanler* v. *Kelsey,* 205 U. S. 466. In other jurisdictions under statutes similar to that of New York and analogous to the Federal statute it is held that property passes under the exercise of a power notwithstanding the appointees take from the donor and would have taken in default of exercise of the power. *Burn-*

ham v. *Treasurer & Receiver General*, 212 Mass. 165; *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588; *Montague* v. *State*, 163 Wis. 58. Cf. also, *Moffitt* v. *Kelly*, 218 U. S. 400.

In any event, whatever may be the law of New York as declared in the *Lansing* case, which involved the state inheritance or transfer tax act, respecting the source and passage of title to property over which a power of appointment has been exercised is not material and the court below erroneously considered the local law controlling here. We are not here concerned with any state rule of property or the source of title to property, but only with the construction and application of a Federal revenue act. In such matters the laws of the States cannot control and the Federal courts must exercise their independent judgment in construing and applying the Federal statute. In *Burnet* v. *Harmel*, 287 U. S. 103, 109–110, an income-tax case, the Court, recognizing the principle that the state law regulates and controls the passage of title to property, pointed out that the principle has no application where the question is solely one of the construction and application of a Federal statute. The Court said (p. 110):

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress

> which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. * * *

In *Tyler* v. *United States,* 281 U. S. 497, 503, holding that the provision of the statute including the value of the whole property held as tenants by the entireties in the taxable estate of the deceased spouse is valid notwithstanding the state rule of property respecting the title to estates so held, the Court said (p. 503):

> According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. * * *

This principle is well established and has been followed by other Circuit Courts of Appeals. *Wear* v. *Commissioner,* 65 F. (2d) 665 (C. C. A. 3d); *Stratton* v. *United States,* 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651; *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d).

The court below disregarded or overlooked the essential nature of the tax and the plain purpose of the statute involved. The decision below is predicated upon the premise that since under the state law title to the property passed from the donor and not from the donee of the power, the property did not pass under the power exercised by the decedent within the meaning of the statute and hence there was no transfer from the decedent subject to the tax. The estate tax, however, is imposed upon the power to transmit or the transmission of property at death and the question in every case is not whether there has been a transfer in a strict sense but whether the death has brought into being or ripened for the survivor (the recipient of property) valuable rights not theretofore possessed. The tax is not limited to transfers of property passing directly from the decedent but includes as well property the completed transfer of which depends upon or relates to the death of the decedent. *Tyler* v. *United States,* 281 U. S. 497, 503, and *Chase Nat. Bank* v. *United States,* 278 U. S. 327. See also *Porter* v. *Commissioner,* 288 U. S. 436. The statutory provision here involved

was incorporated in the Act in aid of the purpose to reach all transfers affected by the death of the decedent.

The Revenue Act of 1918 was the first statute expressly requiring property passing under a general power of appointment exercised by will to be included in the donee's estate, and the report of the Committee on Ways and Means referring thereto (H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21–22) clearly shows that Congress deemed the donee of a general power of appointment over property to be the substantial owner thereof for the purposes of the estate tax, and intended that such property should be included in the donee's estate when the power is exercised by will.

The court below in construing the statute disregarded this clear Congressional purpose and intent and in so doing violated a cardinal principle of statutory construction, as established by decision of this Court. In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, this Court, quoting from *Ozawa* v. *United States*, 260 U. S. 178, 194, said (p. 464):

> It is the duty of this Court to give effect to the intent of Congress. Primarily, this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give

> it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

Other Circuit Courts of Appeals, recognizing the principles established by this Court, have held that property appointed by will under a general power must be included in the taxable estate of the decedent notwithstanding the appointment is to the same persons who would have taken in default of the exercise of the power and under the state rule of property title passes from the donor rather than the donee. In *Wear* v. *Commissioner, supra,* after pointing out that the tax is imposed not upon the property but upon the transmission of or the privilege to transmit property and the question is not whether there has been strictly a transfer but whether the death has brought into being or ripened for the recipients valuable property rights not theretofore possessed, the court said (p. 667):

> We have not been convinced that on the death of the donee nothing happened in respect to the property of the power and in respect to the daughters' right to the property by the exercise of the power. Before its exercise the daughters of the decedent, the twice-named recipients, had, under Pennsylvania law, an estate in the property of the power. But it was a lefeasible estate, not unlike the interest of a beneficiary in a policy of life insurance where the insured has reserved, yet has not exercised,

> the right to change the beneficiary. Their estate was liable to be wholly taken away from them by the exercise of the power in favor of others. So long as the donee lived and retained control over the disposition of the property the daughters ran that risk, which was akin to the risk of a change of beneficiaries in a policy of insurance. Not until the donee died did that risk disappear. Until then he stood in their way. Therefore it was upon his death without exercising the power adverse to them that the estate of the daughters became indefeasible. *Death, with an exercise of the power in their favor, was the event that wrought the change.* Then their estate, theretofore contingent upon the nonexercise of the power against them, became vested, like the interest of a beneficiary of a policy of life insurance becomes vested upon the death of the insured without exercising a reserved right to change the beneficiary, the value of which must, under the cases, be included in the gross estate of the insured for purposes of taxation. *Chase National Bank* v. *United States,* 278 U. S. 327. *The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax.* (Italics supplied.)

In *Lee* v. *Commissioner,* 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563, where the nature of the tax as expounded in *Tyler* v. *United States, supra,* also is referred to, the court, in hold-

ing that property appointed in the exercise of a general power by will must be included in the donee's taxable estate, although the appointee is the remainderman under the donor's will, said (p. 402):

> It is true that, if Robert E. Lee at the time of his decease had entirely omitted to exercise the power of which he was the donee, his brother, George Bolling Lee, would have held the moiety of the former by devise under the will of W. H. F. Lee. But, on the other hand, Robert E. Lee was entitled during his lifetime to appoint the moiety to any other person, and thus defeat the devise to George Bolling Lee. Therefore the exercise of this power by Robert E. Lee at least confirmed the title of his brother to the moiety in question. *Chanler* v. *Kelsey*, 205 U. S. 466.
>
> * * * * *
>
> Accordingly, in this case the exercise by the donee, Robert E. Lee, of the power of appointment vested in him, was the "generating source" of the title of Mary M. Lee for her life or widowhood, and of George Bolling Lee in remainder, of the moiety held by the donee in the estate of W. H. F. Lee.

The decisions of other Federal courts and the Board of Tax Appeals are in accord with the decisions of the Third Circuit Court of Appeals and the Court of Appeals for the District of Columbia. *Stratton* v. *United States, supra; Minis* v. *United*

States, 66 C. Cls. 58, certiorari denied, 278 U. S. 657; *Pennsylvania Co. for Ins. on Lives, Etc.,* v. *Lederer,* 292 Fed. 629 (E. D. Pa.); *Bishop* v. *Commissioner,* 23 B. T. A. 920, and *Hancy* v. *Commissioner,* 17 B. T. A. 464. Although it does not definitely appear from the report of *Stratton* v. *United States, supra,* that the appointees of the property were remaindermen under the will of the donor, this very point was urged in the petition for certiorari in that case (No. 303, October Term, 1931, Petition and Brief in Support, pp. 36–38, Brief in Opposition, pp. 6–7).

Moreover, the consistent departmental interpretation of the statute and the administrative practice thereunder clearly demonstrates that the statute requires the inclusion of all property over which the decedent has exercised a general power of appointment by will. Article 30, Regulations 37, promulgated under the 1918 Act, specifically provided that "property appointed under a general power should be included in the estate of the appointor, although the persons to whom the appointment was made would have taken the property had the power not been exercised * * *." Substantially identical regulations were promulgated under the Revenue Acts of 1921 and 1924 which contained provisions identical with that of the 1918 Act. Article 25, Regulations 63; Article 24, Regulations 68. No similar provision was contained in Regulations 70, promulgated under the Revenue Act of 1926, but

the omission seems to have been inadvertent or possibly such a provision was considered unnecessary. The provision of the Revenue Act of 1926 is substantially identical with that of the preceding Acts. The reenactment of the pertinent statutory provision of the 1918 Act without change in the 1921, 1924, and 1926 Acts in view of the administrative interpretation of the statutes prior to 1926 would seem to indicate legislative approval of the Department's construction. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273.

The instant case, we believe, is controlled by the principle underlying *Porter* v. *Commissioner*, *supra*. There the decedent had transferred property in trust for the benefit of his son and daughter and their children, reserving the power to alter or modify the trust instruments and to change the trusts in any manner, except that no change could be made in favor of the decedent or his estate. The Revenue Act of 1926 (the statute here involved) by subdivision (d) of Section 302 included in the gross estate all property at any time transferred by the decedent where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with another, to alter, amend, or revoke. The Court, holding that the property

transferred must be included in the decedent's estate, said (p. 443):

> The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. * * * Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).

The Court, rejecting the contention that the statute so construed is unconstitutional, said (p. 444):

> But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question,

> the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition.

Similarly, in this case, which involves subdivision (f) of Section 302 of the same statute, the decedent until her death was dominant in respect to the disposition of the property to others than herself (the power being exercisable only by will—she could not appoint to herself) and her death with the power exercised in favor of her sisters ended the possibility of appointment to others and was, in respect of title to the property, the source of valuable assurance passing from the dead to the living.

In this case the decedent clearly had a general power of appointment over property left in trust for her by her father and she manifestly exercised that power by her will in devising such property to her sisters. The mere fact that her sisters were her sole next of kin and would have taken the property under the will of their father had the power not been exercised, and under the state law the title to the property passed to the sisters from their father and not from the decedent, is not material. Nor is it of any consequence that the sisters expressly elected to take from their father and not from the

decedent. The fact remains that the decedent had a general power of appointment and that she did everything possible or required of her to exercise that power by will. The voluntary act of the sisters as recipients of property in refusing the appointment because the property came to them in any event, cannot be effective to extinguish the fact that the decedent fully and completely exercised the power. It seems plain that within the meaning of the statute here involved the property in question passed under the general power of appointment exercised by the decedent by her will and must be included in her taxable estate.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous and should be reversed.

J. CRAWFORD BIGGS,
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FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

NOVEMBER 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

DOCKET NO. 268.

GUY T. HELVERING,
Commissioner of Internal Revenue,
Petitioner,

against

E. MORGAN GRINNELL,
as Executor of the Estate of Annie Stone,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BERNHARD KNOLLENBERG,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

DOCKET NO. 268.

GUY T. HELVERING,
Commissioner of Internal Revenue,
Petitioner,

against

E. MORGAN GRINNELL,
as Executor of the Estate of Annie Stone,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 33) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 15-22) is not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. The judgment of the court below was entered May 7, 1934 (R. 38).

Statement of the Case.

The statement of the case contained in the petitioner's brief (pp. 3-5) is satisfactory to the respondent.

ARGUMENT.

POINT I.

The decisions of the Circuit Court of Appeals for the Third Circuit and the Court of Appeals of the District of Columbia alleged to be in direct conflict with the decision herein are not actually in conflict.

The decision of the Circuit Court of Appeals in this case is based on the law of the State of New York with respect to the passage of property under a power of appointment. The Circuit Court of Appeals examined this law and found that an appointee under a power has the right of election to accept or refuse the appointment. An essential element of a completed appointment is that the appointee accept, and if he refuse to accept this essential element is lacking and the attempted appointment is a nullity. This is on the authority of *Matter of Lansing*, 182 N. Y. 238.

The remaindermen in the present case specifically and definitely refused the appointment. Shortly after probate of decedent's will they executed and filed with the Surrogate's Court in New York a writing in which they elected to take the property as remaindermen under their father's will and refused to take the property as appointees under decedent's will. (R. 19.)

Under these circumstances the conclusion reached by the Circuit Court of Appeals is, it is submitted, the only possible one. Section 302 of the Revenue Act of 1926, provides that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * * (f) to the extent of any property *passing under* a general power of appointment exercised by the decedent * * *." The statute only includes the value of the property in the gross estate if it *passes under* the power of appointment, that is, if nothing is done which defeats the effectual exercise of the power of appointment. Under the law of the State of New York property demonstrably does not pass under a power of appointment where the appointee refuses to accept the appointment.

This same condition was not present in the cases of *Wear* v. *Commissioner of Internal Revenue*, 65 F. (2d) 665 (C. C. A. 3d, 1933) and *Lee* v. *Commissioner of Internal Revenue*, 57 F. (2d) 399 (App. D. C., 1932). In both of those cases the appointees were the same persons who would have taken as remaindermen if the appointments had not been made. To that extent the cases are similar to the present case. The appointees did not, however, refuse the appointment and it does not appear from the reported opinions what the law of the State of Pennsylvania and of the State of Virginia would have been in the event of a refusal.

The respondent does not concede that the decisions in the two above mentioned cases are correct. He does submit, however, that, whether correct or not, these decisions are not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the instant case.

POINT II.

None of the other grounds relied on by the petitioner is sufficient to warrant the granting of a writ of certiorari by this Court under its Rule No. 38.

The petitioner's brief (p. 8) alleges that the writ of certiorari should be granted because "the decision below is erroneous and nullifies the manifest purpose of the intent of the statute." The respondent submits that, on the contrary, the decision below is based on a conclusion which is irresistible under the facts of this case.

The petitioner further alleges (Pet. Brief, p. 10) that "the decision below is contrary to and negatives the consistent departmental interpretation of the statute and administrative practice." The regulations of the department have not been consistent in regard to the statute taxing passage of property under a general power of appointment because the regulations which were issued in connection with the Revenue Acts of 1918, 1921, and 1924 were omitted in the case of the Revenue Act of 1926. Furthermore, the decision below is not contrary to departmental interpretation of the statute as evidenced by the department's regulations, because the regulations do not cover the situation where the appointee refuses the appointment and thus by the law of the state where the property is located completely defeats the appointment.

POINT III.

The petition for writ of certiorari should be denied.

BERNHARD KNOLLENBERG,
Counsel for Respondent.

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RESPONDENT'S BRIEF

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 268

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

BERNHARD KNOLLENBERG,
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LORD, DAY & LORD,
ALLEN EVARTS FOSTER,
HARRY J. RUDICK,
Of Counsel.

November 1934.

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IN THE

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No. 268

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

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v.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 33) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 15-22) is not reported.

Jurisdiction.

The judgment of the court below was entered May 7, 1934 (R. 38). The petition for certiorari was filed August 7, 1934, and was granted October 8, 1934. The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

The statement contained in the petitioner's brief (pp. 3-5) is satisfactory to the respondent.

Summary of Argument.

Section 301 (a) of the Revenue Act of 1926 (26 U. S. C. A., sec. 1092) imposes an estate tax upon the transfer of the net estate of every decedent dying after its enactment, and section 302 (f) of the act (26 U. S. C. A., sec. 1094) (f) provides that, in valuing the gross estate, there should be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The trust estate here did not pass under the power of appointment for the reason that the appointees elected in writing to renounce their bequests under the will of Annie Stone and to take as remaindermen under their father's will, and for the further reason that, under the New York law, which governed the passage of title, "the attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance." *Matter of Lansing*, 182 N. Y. 238, 243, 74 N. E. 882, 884.

The real question is not, as stated by the Commissioner (Brief, p. 7), whether there has been a "shifting of the economic benefits in property" or "whether the death of the decedent ripened or enlarged for the survivors valuable property rights".* Had the decedent died intestate, the

*This might be the question if the constitutionality of the statute were being challenged, which is not the case.

Commissioner would not have asserted any tax. Yet there would have been a shifting of economic benefits and a ripening or enlargement of property rights for the survivors. This, therefore, cannot be the question at issue. The real and only question is whether the property "*passed under*" a power of appointment exercised by the decedent. Respondent submits that the Court below was correct in holding that within the meaning of those words as used in Section 302 (f) of the 1926 Act, where the appointees reject the appointment, there can be no passing of property under it.

Argument.

I. The property in question did not pass under a general power of appointment exercised by the decedent and should therefore be excluded from the decedent's taxable estate.

There is but a single question to be determined on this appeal:

Did the principal of the trust fund created by the will of John O. Stone who died in 1876 "pass under a general power of appointment exercised by" Annie Stone?

The will of John Stone created a trust fund, the income of which was to be paid to Annie Stone during her life. On her death, the principal was to pass to her appointees, or in default of appointment to her issue and in default of issue to her next of kin. Annie Stone's next of kin thus acquired a vested remainder in the property subject to be divested by the exercise of the power in favor of strangers. (*Matter of Haggerty,* 128 App. Div. 479, aff'd 194 N. Y. 550, 57 N. E. 120; New York Real Property Law, Sec. 41; Personal Property Law, Sec. 11.)

When Annie Stone died, she appointed the property to her two sisters, Ellen J. Stone and Sarah J. Grinnell, who were her only next of kin. But the sisters rejected the appointment by executing and filing an instrument of election whereby they renounced their right to receive said property under the fifth paragraph of decedent's will and elected to take such property under the fifth paragraph of the will of John O. Stone.

The appointees having rejected the decedent's appointment, there is no possible ground for holding that the property passed under such appointment, and the Court below so held.

The respondent challenges the Commissioner's statement (Brief, p. 8) that the instant case "falls squarely within the provisions of the statute". The statute provides—Sec. 302 (f)—that in valuing the gross estate there shall be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will". The respondent concedes of course that the power of appointment held by the decedent was a general one. He also concedes that the decedent exercised it. But he denies that the property passed under it. The decedent exercised the power in favor of her sisters, but they were not obligated to accept the appointment. They specifically renounced it and refused to take the property under it. To say that property passes under an appointment which is specifically rejected is to stretch the elasticity of language to the bursting point.

II. **The construction of the Court below is in accordance with common sense and with the principle of decisions in effect at the time the provision in question was first included in federal estate tax legislation.**

The Commissioner concedes that if the decedent had died intestate or had refrained from including in her will any mention of the appointment, the property in question would not be included in the taxable estate. He further admits, as the facts require him to admit, that the appointment was to the very persons who would take (and in the same proportions) as remaindermen under their father's will, in default of appointment. The Commissioner's position is therefore in effect that the superfluous attempted exercise of the power determines the taxability of the property. This is an obviously unreasonable, not to say absurd, result, which the construction of the Court below avoids. This Court might well be tempted to depart from the natural meaning of the language of the statute, if necessary, to *avoid* such a result, but it is inconceivable that it will modify it to *produce* such a result.

The Respondent's construction of Section 302 (f) is further supported by two important Court decisions in force at the time a similar provision (Section 402 (c) of the Revenue Act of 1918) was first included in the federal estate tax law. These decisions are *Matter of Lansing*, 182 N. Y. 238 (1905), and *Matter of Delano*, 176 N. Y. 486 (1907), (affirmed under the name of *Chanler* v. *Kelsey*, 205 U. S. 466), cases which arose under Section 220 of Chapter 284 of the New York Laws of 1897 reading as follows:

> "Whenever any person * * * shall exercise the power of appointment derived from any dispo-

> sition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act" (the New York Transfer Tax Act).

In the *Lansing* case, counsel for the State of New York maintained that, under the provisions quoted above, the exercise of a power of appointment subjected the appointed property to the New York transfer tax even though the property was appointed to the very persons who would have taken as remaindermen anyway. The New York Court of Appeals rejected this contention, saying (pp. 243-7):

> "Her" (the appointee's) "rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance.
>
> * * * * * * * * *
>
> "The power as it might have been exercised would have left Mrs. McVickar with no title at all, but as it was exercised it left her the same title that she had before. It gave her nothing and took nothing away from her. She is not forced to claim through the second clause of her mother's will, for she took under the will of her grandfather. She had the right of

election and could refuse to take under the appointment and still hold the property, for her title was as good without as with the exercise of the power. Her attitude in this proceeding, both now and before the surrogate, is that she took wholly from her grandfather and in no respect through the action of her mother.

* * * * * * * * *

"We pass without serious discussion that part of the statute which provides, in substance, that the failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. * * * because as we held in the *Pell* case such an act imposes no direct tax and is unconstitutional since it diminishes the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation."

In the *Delano* case, *supra,* the Court had sustained the State's position that where the donee of the power appointed the property to persons other than those who would have taken the property as remaindermen (or who would have taken in different proportions or subject to different conditions), the property so appointed was properly included by the State in the decedent's taxable estate. But the Court, in the *Lansing* case, found no difficulty in reconciling the two decisions, because in the *Delano* case the exercise of the power of appointment was the effective source of passing the property to the appointee or appointees, whereas in the *Lansing* case it was not.

In the light of these decisions it is fair to assume that Congress meant precisely what it said in using the words

"property *passing under* a general power of appointment", namely, that property subject to a general power of appointment is to be included in the taxable estate if "*passing under*" a power exercised by the decedent, but not if, because of default in appointment or because the appointment is superfluous, it passes under the original donor's will or deed.

Under the construction contended for by the Commissioner, the mere exercise of the power would be sufficient to bring the property within the application of the statute. But unless the statute is held to refer to an *effectual* exercise of the power, the words "passing under" become meaningless. If Congress had intended to make the mere exercise of the power the basis for the tax, the statute would no doubt have read

> "Property *subject to*" [instead of "*passing under*"] "a general power of appointment exercised by the decedent by will".

In the instant case the decedent's exercise of the power was rendered completely ineffectual by her sisters' renunciation of her appointment. "The attempt to execute the power was not effectual because it did nothing". *Matter of Lansing*, 182 N. Y. 238. It can hardly be asserted with any show of reason that property passes under a nullity.

The practice of extending the language of tax statutes by implication beyond commonly accepted limitations has never had the approval of this Court. In *Crooks* v. *Harrelson*, 282 U. S. 55, this Court said:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences

thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter.

* * * * * * * *

"Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States *v.* Merriam, 263 U. S. 179, 187, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240, 29 A. L. R. 1547, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord CAIRNS in Partington *v.* Attorney-General, L. R. 4 H. L. 100, 122, that 'if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute'."

III. **The real question in the present case is not "whether the death of the decedent ripened or enlarged for the survivors' valuable property rights", but rather whether there has been a passing of property under the appointment.**

The Commissioner appears to rely heavily on the following argument set forth in his brief, page 12:

"The estate tax is imposed upon the power to

> transmit or the transmission of property at death and the question in every case is not whether there has been a transfer in a strict sense but whether the death has brought into being or ripened for the survivor (the recipient of property) valuable rights not theretofore possessed. The tax is not limited to transfers of property passing directly from the decedent but includes as well property the completed transfer of which depends or relates to the death of the decedent. *Tyler* v. *United States*, 281 U. S. 497, 503, and *Chase Nat. Bank* v. *United States*, 278 U. S. 327. See also Porter v. Commissioner, 288 U. S. 436."

This argument merely confuses the issue. The respondent's position in the present case is *not*, as assumed by the Commissioner, predicated upon the proposition that the federal estate tax is imposed exclusively upon the transfer of property owned by the decedent and passing directly from the decedent at death. The three cases cited by the Commissioner establish clearly that in certain cases the tax may be and is exacted with respect to property not owned by the decedent at the time of his death, or not passing directly from him. But in these cases the statute plainly imposed the tax and the point at issue—in the *Chase* case, the inclusion in the estate of the proceeds of insurance policies over which the decedent had a power of control; in the *Tyler* case, the inclusion of property owned by the decedent and his spouse as tenants by the entirety; and in the *Porter* case the inclusion of property transferred by the decedent subject to a power of alteration,—was not the construction of the statute, but its constitutionality. As the Court below observed in its opinion (R. 22):

> "But in each of those cases (Tyler and Chase National Bank) the statute expressly covered the subject matter sought to be taxed and the question was not one of interpretation, but of constitutional power."

In the instant case, the respondent is not challenging the validity of the statute; he is merely contesting the Commissioner's interpretation of it. However, it should be borne in mind that the *Chase National Bank* case, the *Tyler* case, the *Porter* case and other cases upholding the validity of estate taxes imposed with respect to property not owned by the decedent at the time of his death or not passing directly from him, all involved property which at some prior time had belonged to the decedent. No case has gone so far as to hold that the tax applies with respect to property which was never owned by the decedent. In the instant case, the property was never owned by the decedent because under the laws of New York, at least, a general power of appointment exercisable by will is not equivalent to ownership. *Root* v. *Stuyvesant,* 18 Wendell 257, 268; *Matter of Lansing, supra.**

There is a very good practical reason for distinguishing between property which is or was owned by the decedent, and property which was never owned by the decedent, and that is the possibility of not being able to enforce the tax in the latter case. For example, if in the instant case, the decedent Annie Stone had died leaving no property of her own, there would be no means of enforcing the tax with respect to the property subject to the power of appointment. Her sisters, having taken the property under the will of their father, could not be held liable for any tax on the decedent's estate. The property, of course, would not form a part of the decedent's estate for administration purposes. It should not be inferred

*If the possession of a power of appointment were the equivalent of ownership of property, the property covered by the power would, indeed, be subject to federal estate tax; not, however, under sub-section (f) relating to transfers under a power of appointment, but under sub-section (a) of Section 302 relating to the taxation of ordinary property interests passing on the death of the deceased.

that Congress intended to enact a tax the collection of which could not be enforced.

IV. **It is respectfully submitted that the decisions of other courts which have passed upon this question are distinguishable or unsound.**

The reasoning of the Courts in the cases *Wear* v. *Commissioner*, 65 F. (2d) 665 (C. C. A. 3rd), and *Lee* v. *Commissioner*, 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563, is apparently in conflict with the decision of the Court below in the present case, although the *Wear* and *Lee* cases may be distinguished on the ground that in neither of those cases does it appear that the donees rejected the right to take under the appointment and elected to take under the will of the donor.*

The Commissioner (Brief, p. 15) quotes from the *Wear* opinion as follows:

> "*Death, with an exercise of the power in their favor, was the event that wrought the change.* Then their estate, theretofore contingent upon the non-exercise of the power against them, became vested, like the interest of a beneficiary of a policy of life insurance becomes vested upon the death of the insured without exercising a reserved right to change the beneficiary, the value of which must, under the cases, be included in the gross estate of the insured for purposes of taxation. * * * *The generating source of the change was the death of the donee without action*

*Moreover, in the *Lee* case, the appointment effected a different distribution than would have resulted from non-exercise of the power: Had there been no exercise of the power, the decedent's brother would have received the property in fee. The decedent, by his will, provided that his widow should have a life estate in the property and that his brother should have the property only after the widow's death. The decedent's will thus cut down the estate which the brother would otherwise have received, with the result that, in the *Lee* case, the property in part passed under the exercise of the power.

adverse to them. That, too, was the generating source of the tax. * * *" [Italics Commissioner's.]

It is respectfully submitted that the Court's reasoning in the *Wear* case is not sound. The fallacy lies in the last quoted italics:

"The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax."

This statement, if correct, would justify the imposition of the tax even if the decedent had died intestate; and for the imposition of such a tax, the Commissioner himself concedes that the statute provides no basis whatever.* In the instant case *death* was the event that wrought the change—not "death, with the exercise of the power in their favor". The attempted exercise of the power was a nullity, and, as stated above, death alone would not be sufficient to form a basis for the tax.

The Court's analogy to life insurance policies is not apt, for the reason that the Court is comparing property owned by a decedent with property not owned by a decedent. Thus, if a decedent had a power of control, *e. g.*, right to change beneficiary, over policies on his life *but not taken out by him,* his death would not give rise to any estate tax on the proceeds of the policies. Yet it would be the event upon which the property would pass freed of the possibility of exercise of the power of change.

As for the *Lee* case, the Court in that case declared that

"* * * the exercise by the donee, Robert E. Lee, of the power of appointment vested in him, was the 'gen-

*Such a tax, in so far as it related to powers conferred prior to its enactment might even be unconstitutional. *Matter of Pell,* 171 N. Y. 48, 63 N. E. 789.

> erating source' of the title of Mary M. Lee for her life or widowhood, and of George Bolling Lee in remainder, of the moiety held by the donee in the estate of W. H. F. Lee."

(This language is quoted in the Commissioner's Brief, p. 16.)

Clearly, the exercise of the power in the *Lee* case was the "generating source" of the life estate of Mary A. Lee, for without it, as indicated in the footnote on page 12 herein, she would have received no interest in the property; it would have passed in fee to George Lee. Whether the exercise of the power was the "generating source" of George Lee's remainder interest is questionable, but, in any event, the Court's reasoning is obviously inapplicable to the present case, for here the decedent's exercise was rendered completely ineffectual by the refusal of her appointees to take under it.

This is clearly recognized in the opinion of the Court below in the present case:

> "* * * It is conceded that the revenue act would not have imposed an estate tax upon the transfer if the remainder had vested in possession without an attempted exercise of the power of appointment. Therefore, it hardly seems right to say that: 'The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax.' Such reasoning would require the imposition of a tax under the act even though Annie Stone had died intestate, though the statute furnishes no warrant for taxation under such circumstances. The argument of the opinion in Wear *v.* Commissioner is concerned mainly with the constitutional authority of the Government to tax property where the source of the transfer was the death

of the donee of a power 'without action adverse' to persons having interests derived under the will of the donor. We need not differ with the conclusion that it might be taxed, but we think it was not taxed by an act directed only at property 'passing under a general power of appointment' because there was no such property here. The appointees not only declined to take the gift, but the appointment when exercised in favor of the same persons who would take irrespective of it was 'a mere form with no substance' which the law of New York that regulates the passage of title has refused to recognize. Matter of Lansing, 182 N. Y. 238, 243, 74 N. E. 882. In a tax statute especially, such a doubtful imposition involving as it does an extension of the statute to cover powers of appointment, having no effective import, should not be sanctioned. Crooks *v.* Harrelson, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156."

As for the other cases cited by the Commissioner (Brief, pp. 12, 16 and 17), (*Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3); *Stratton* v. *United States,* 50 F. (2d) 48, (C. C. A. 1), certiorari denied 284 U. S. 651; *Minis* v. *United States,* 66 C. Cls. 58, certiorari denied, 278 U. S. 657; *Pennsylvania Co. for Ins. on Lives, Etc.* v. *Lederer,* 292 Fed. 627 (E. D. Pa.); *Bishop* v. *Commissioner,* 23 B. T. A. 920, and *Hancy* v. *Commissioner,* 17 B. T. A. 464), it does not appear in any of them, with the exception of the *Hancy* case (which the Board followed in deciding the present case), that the property was appointed to the same persons, and in the same proportions, as would have taken in default of the exercise of the power. Neither does it appear in any of them—except the *Hancy* case—that the appointees rejected the appointment.

V. **The Court below correctly held that the law of New York determines whether there was a passing of property under the power.**

The Commissioner argues (Brief, p. 10) that whatever may be the law of New York as declared in the *Lansing* case, *supra,* the New York law is not controlling in the present case, and cites in support of the argument *Burnet* v. *Harmel,* 287 U. S. 103 and *Tyler* v. *United States, supra.*

These cases, far from supporting the Commissioner's position on this point, establish its unsoundness. The *Tyler* case involved the constitutionality of the statute in so far as it requires the inclusion in the gross estate of the entire value of property held as tenants by the entirety. This Court said, in upholding the constitutionality of the statute:

> "The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. *These decisions establish a state rule of property, by which, of course, this court is bound. Warburton* v. *White,* 176 U. S. 484, 496." (Italics ours.)

As indicated by the above quotation, the general rule is that, in the absence of provision to the contrary, the application of the federal tax laws follows the rules of property in the various States, even though these rules are not uniform. Thus in community property States,* the income

Poe v. *Seaborn,* 282 U. S. 101 (1930) (Washington); *Goodell* v. *Koch,* 283 U. S. 118 (1930) (Arizona).

from the husband's personal services is taxed in equal shares to the husband and wife, although in non-community property States, the entire income from his personal services is taxable to the husband.*

In the *Tyler* case, the character of the tenancy was established by the law of Maryland. If under the law of the state, the original conveyance of the property in question had created a tenancy in common instead of by the entirety, only a part of the value of the property would have been taxed. Thus the *Tyler* case, instead of being authority for the position that the State law is immaterial, recognizes the principle that such law is controlling in cases of this nature.

In the *Harmel* case, this Court also recognized the principle when it said:

> "State law may control only when the federal taxing act by express language or necessary implication, makes its own operation dependent upon the state law."

(Quoted on p. 11 of Commissioner's Brief.)

When the statute refers to property passing under a power of appointment it at least by necessary implication if not by express language, makes its own application dependent upon the question of whether there has been a passing under the state law. If under the state law the decedent's appointment were ineffective, it could not be maintained that there was a passing of property under it.

The descent and distribution of property of decedents is a matter subject to the exclusive jurisdiction of the states (*Orr* v. *Gilman*, 183 U. S. 278), and the laws of the state

*Lucas v. Earl, 281 U. S. 111 (1930).

where the situs of the property is located, should, in the absence of clear-cut language by Congress to the contrary, control in determining whether there has been a passing of property. This principle was very recently applied by the Board of Tax Appeals (which decided the present case against the respondent herein) in *Cone* v. *Commissioner*, 31 B. T. A. Pamphlet No. 104. There the decedent had a general power of appointment. He disposed of his estate by a residuary clause without any mention of the power or any specific bequest of the property covered thereby. The Board held that under the law of Illinois where the property had its situs, the residuary bequest was not an exercise of the power, and therefore the property could not be included in the gross estate.

VI. **The Commissioner's contention that the Report of the Committee on Ways and Means sustains his construction of the statute is plainly negatived by the language of the Report.**

The Commissioner on page 13 of his Brief, asserts that the Report of the Committee on Ways and Means on the Revenue Act of 1918 (which was the first statute expressly requiring property passing under a general power of appointment exercised by will to be included in the donee's estate) shows that Congress intended that property over which the decedent had a general power of appointment should be subject to estate tax if the power was exercised even though the property did not pass under such exercise.

Assuming for the sake of argument that the present case is one in which the language of the statute is so ambiguous as to warrant a resort to the Committee Report

for guidance, the language of the Report, far from sustaining the Commissioner's construction, supports the position of the Respondent that the tax applies only to property which *passes under* the exercise of the power; and that the naked, ineffective exercise of the power does not give rise to the tax. The language of the Committee Report is as follows (pp. 21-22):

> "*There has also been included in the gross estate the value of property passing under a general power of appointment.* This amendment as well as that preceding is for the purpose of clarifying rather than extending the existing statute. A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. *The absence of a provision including property transferred by power of appointment makes it possible,* by resorting to the creation of such a power, *to effect two transfers of an estate with the payment of only one tax.*" (Italics ours.)

From the above, it appears that "there has also been included in the gross estate the value of property passing under a general power of appointment" and that the paramount purpose of Congress was to prevent "two transfers of an estate with the payment of only one tax". The present case clearly falls outside the language of the Report, for the attempted second transfer was rejected by the transferees who claimed the right to take and in fact took under the original deed. What happened in the present case was exactly the same as if John Stone, the decedent's

father, had left the property to the decedent for life, with remainder to her next of kin. Could it be maintained in such case that there were two transfers?

Assuming that Congress may impose a tax on the mere possession of a power of appointment, regardless of its exercise or effective exercise, the fact remains that Congress has not seen fit to do so. Had the intent of Congress been as the Commissioner asserts it to have been, is it not reasonable to suppose, as has heretofore been pointed out (p. 8), that Congress would have substituted for the words "passing under" the words "subject to". There is no more basis for emasculating the meaning of the words "passing under" than there would be for ignoring the word 'general", and making the statute include all powers, whether general or special. Indeed, an effectual exercise of a *special* power would achieve two transfers of an estate; yet, clearly only one tax would be payable, because Congress confined the statute to general powers.

The Commissioner also urges here, as he did in the Court below, that, because the Treasury Regulations promulgated under the 1918, 1921 and 1924 Acts contained a provision that "property appointed under a general power should be included in the estate of the appointor, although the persons to whom the appointment was made would have taken the property had the power not been exercised * * *" and because Congress subsequently re-enacted the statute as it originally stood, Congress must have intended the tax to apply to a situation of the kind presented in the case at bar. The argument is without force, however, first, because the Treasury Regulations have never provided that the tax shall apply to a case, like the present, where the exercise of the power is ren-

dered ineffective by the appointee's renunciation of the appointment; and second, because the rule of construction relied on is not applicable to the present case since, under the very Act (the 1926 Act) herein involved the Department omitted from the Regulations the sentence quoted above—thus indicating an abandonment by the Department of its prior position. This contemporaneous construction of the 1926 Act by the Department which tends to sustain respondent's construction of the statute, is entitled to great weight.

VII. **The Commissioner's assertion that "in other jurisdictions under statutes analogous to the Federal statute, it is held that property passes under the exercise of a power notwithstanding the appointees would have taken in default of exercise of the power" is erroneous.**

The Commissioner asserts on page 9 of his brief:

> "In other jurisdictions under statutes similar to that of New York and analogous to the Federal statute it is held that property passes under the exercise of a power notwithstanding the appointees take from the donor and would have taken in default of exercise of the power.",

and cites in alleged support of this assertion the following cases:

> *Minot* v. *Treasurer & Receiver General,* 207 Mass. 588;
> *Burnham* v. *Treasurer & Receiver General,* 212 Mass. 165;
> *Montague* v. *State,* 163 Wis. 58.

Analysis of the decisions cited show that they do not sustain the Commissioner's assertion.

The *Minot* case sustained the constitutionality of a provision in the Massachusetts inheritance tax law that:

> "Whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same * * * a disposition of property * * * shall be deemed to take place to the extent of such omission or failure."

The *Burnham* case held that the above-quoted provision was intended to cover special as well as general powers of appointment and that as so construed, the statute was constitutional, following the *Minot* case. In the *Montague* case, which involved a statute of Wisconsin containing a provision substantially the same as that in the Massachusetts statute quoted above, the Wisconsin court held that the provision was intended to cover special as well as general powers and that as so construed the statute was constitutional.

It will be seen from the above that the Massachusetts and Wisconsin statutes which the Commissioner describes as being "analogous to the Federal statute" are vitally different from the federal statute and that the Massachusetts and Wisconsin cases cited by the Commissioner do not in the least sustain his position in the present case. The defect in the Commissioner's argument is that he in effect asks this Court to interpolate in the federal statute provisions which were inserted by the legislature in the Massachusetts and Wisconsin statutes, whereas the very omission of these provisions in the federal statute shows that Congress had a different intent. Congress provided and must be assumed to have intended that under the federal act property subject to a power of appointment shall be included in the taxable estate of the decedent only if the

property passed under the exercise of the power of appointment. The inevitable inference is that in other cases property subject to a power of appointment is *not* to be included in the taxable estate. The Court below so held, and this decision was, it is submitted, sound.

Conclusion.

The property in question did not *pass under* a power of appointment exercised by the decedent, and should therefore be excluded from the taxable Estate. The decision of the Court below should be affirmed.

Respectfully submitted,

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Of Counsel.

November 1934.

CPY9945

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 268.—October Term, 1934.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* E. Morgan Grinnell, as Executor of the Estate of Annie Stone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 4, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

In 1876, John O. Stone died a resident of New York. He left a will by which he created for the benefit of his daughter, the decedent, Annie Stone, a trust fund, the income from which was to be paid to her during her life. The will provided that upon her death her share of the estate should go and be applied to such persons and such uses as she might appoint by last will and testament; but in default of such appointment, her share of the estate should go and belong to her children or issue, respectively, by right of representation; or, in default of such issue, to her next of kin. Surviving John O. Stone, were his widow and three daughters —namely, this decedent, and Ellen J. Stone and Sarah J. Grinnell. These constituted his only heirs at law and next of kin. The widow died many years before the death of Annie Stone. Annie Stone, the decedent, died September 24, 1927, unmarried, without issue, and leaving as her sole next of kin her two sisters just named. Her will provided "that what property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath in equal shares to my dear sisters Ellen J. Stone and Sarah J. Grinnell, . . ." After the death of Annie Stone, the two sisters in writing renounced their right to receive the property under this paragraph of her will and elected to take the property under the provisions of the will of their father, John O. Stone.

The Commissioner of Internal Revenue declared a tax deficiency of several thousand dollars in the federal estate tax on the estate of Annie Stone, upon the theory that the property derived from the estate of her father was required to be included in her gross estate in virtue of the fact that she had exercised a power of appointment in respect thereof. The Board of Tax Appeals, on review, sustained the commissioner. The order of the Board of Tax Appeals based on this holding was reversed by the court of appeals, 70 F. (2d) 705, upon the ground that the property did not *pass* under the exercise of the power; and consequently, an essential condition of § 302 of the act of 1926 was not present.

Sec. 302, c. 27, 44 Stat. 9, 70, 71, provides:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; . . ."

The crucial words are "property passing under a general power of appointment exercised by the decedent by will." Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the property, it could not well be said that the property had ~~passed~~ passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative.

The contention of the government is that the tax is imposed "upon the power to transmit or the transmission of property by

death; the shifting of the economic benefits in property is the real subject of the tax. . . . the property in question passed to the sisters under the general power of appointment exercised by the decedent by will within the meaning of the statute." But this involves the obviously self-destructive conclusion that an unsuccessful attempt to effectuate a thing required by the statute is the same as its consummation. The tax here does not fall upon the mere shifting of the economic benefits in property, but upon the shifting of those benefits by a particular method—namely, by their "*passing* under a general power of appointment", and not otherwise. Acceptance of the government's contention would strip the italicized word of all meaning.

The government relies upon *Chase Nat. Bank* v. *United States,* 278 U. S. 327, and *Tyler* v. *United States,* 281 U. S. 497. In neither of these cases was the court concerned with the meaning of the act. In the first case (p. 334) the court said the tax was plainly imposed by the explicit language of the statute, and that there was no question as to its construction. The sole question for determination was as to the constitutional validity of the act. The same is true in respect of the second case. Neither case sheds any light upon the question here involved, namely, the meaning and application of the statutory provision.

The court below leaned confidently upon the decision of the New York Court of Appeals in the *Matter of Lansing,* 182 N. Y. 238. That well considered case and this in principle cannot be distinguished. We think the reasoning of the New York court as to the meaning and application of the state law equally applies to the federal statute here in question. There, as here, the contention of the taxing authorities (there under the state act, here under the federal act) was that the appointee named in the will of the donee of the power took her property thereunder and not under the will of the creator of the power, notwithstanding the property had been given to her by the will of the former subject to the power of appointment. But the state court answered that the power gave the appointee nothing and took nothing away from her; that she had the right of election and could refuse to take under the appointment and still hold the property, since her title without was as good as it was with the power; that she treated the exercise of the power as a mere attempt and not as an effective

execution of it; and that it sufficiently appeared that she elected to reject title from that source.

"Her rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. . . . Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance."

The opinion, p. 244, points out that the power might have been exercised so as to have left the appointee with no title at all; but that in fact it was exercised so as to leave her the same title that she would have had if the power had not been exercised. The same is true here.

"An appointee under a power", the court continued, "has the right of election, the same as a grantee under a deed. . . . He can accept the title tendered or reject it in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where it was before."

We granted the writ of certiorari in this case because of an alleged conflict with *Wear* v. *Commissioner*, 65 F. (2d) 665, and *Lee* v. *Commissioner*, 57 F. (2d) 399. The reasoning and conclusions of those courts and of the court below cannot be reconciled. We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right, and we hold accordingly.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.